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IN THE

Supreme Court of the United States

No. 102

EDDIE BRATBURD and RUTH E. BRATBURD, *Petitioners*,

v.

STATE OF MARYLAND, *Respondent*.

PETITION FOR REHEARING

JAMES J. LAUGHLIN,
ALBERT J. AHERN, JR.,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Statement of the Case

The statement of the case is fully set forth in pages two to eighteen in the Petition for Certiorari filed in this Court.

Questions Presented

1. Is not a search warrant issued pursuant to a statute that has been repealed void and of no legal significance, such that all goods and materials taken pursuant to that search warrant are inadmissable at the time of trial?

2. Does not petitioners' conviction lack due process of law and were not their constitutional rights against unreasonable search and seizure violated by the prosecuting officials?

Argument

Petitioners urge this Honorable Court that a lower court in Maryland has ruled in *State* v. *Higginbottom*, filed March 14, 1952, that Section 50-10 (App. 34) of the local laws of Montgomery County repeals by implication any State laws inconsistent with its provisions.

Petitioners now earnestly suggest that their contention that the search warrant issued in the above entitled cause was void and of no legal significance has added weight in view of the *Higginbottom* decision above and the constitutional question involved is so substantial that it deserves this court's serious consideration.

Petitioners were sentenced under the penal provisions in Section 50-10 (App. 34) of the Montgomery County Code. They were charged with a violation of Section 50-3 (App. 32) of the local Montgomery County Code. The search warrant, however, was issued under a state statute, and not issued by a person or authority within the provisions of Section 50-5 (App. 33) of the Montgomery County Code which specifically authorizes only Justices of the Peace and the Clerk of the Circuit Court, but not judges of the Circuit Court, to issue warrants for the search of gambling paraphanalia in Montgomery County.

In the *Higginbottom* case the Maryland Code held that the state gambling law was repealed insofar as it was inconsistent with Section 50-10 (App. 34) of the Montgomery County Code. The court quoted this court's language in *United States* v. *Yuginovich*, 256 U.S. 463, wherein this court stated

> "In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lower penalty."

Petitioners therefore earnestly contend that the statement of the Court of Appeals of Maryland found App. 81, to wit:

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> "It is not essential to the validity of a search warrant that it shall mention the particular statute by authority of which it is issued."

does not answer petitioners' constitutional proposition that when the search warrant in the instant case was issued by a judge of the Circuit Court in violation of Section 50-5 (App. 33) of the Montgomery County Code, the warrant was a nullity, the court had exceeded its jurisdiction and hence all the fruits of the search were in violation of petitioners' constitutional rights under the Fourth Amendment and should have been excluded.

II.

Does not the conduct of the prosecutors and the police in the instant case overreach the recent ruling of this court in *On Lee* v. *United States*, 343 U.S. 747, and come within the purview of Mr. Justice Frankfurter's opinion in *Schwartz* v. *State of Texas* decided by this court December 15, 1952?

In the instant case all the evidence which was gathered to obtain the search warrant was obtained by the use of wire tapping. Petitioners' conviction rests upon the fruits of the search warrant so issued. It is to be noted that as Mr. Justice Frankfurter pointed out in *Schwartz* v. *State of Texas*, the State of Maryland has a statute which in petitioners' sincere judgment effectuates the principle practiced in the Federal courts against illegal search and seizure. The State of Maryland has a statute which is found in Article 35, Section 5, which reads

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be

> to compel one to give evidence against himself in a criminal case; provided, however, that nothing in this section shall prohibit the use of such evidence in Baltimore County, Baltimore City, Anne Arundel, Caroline, Carroll, Cecil, Frederick, Harford, Kent, Prince George's Queen Anne's, Talbot, Washington, Wicomico and Worcester Counties, in the prosecution of any person for unlawfully carrying a concealed weapon. Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title "Gaming", or in any laws amending or supplementing said sub-title."

It is petitioners' view that when evidence was obtained by tapping the petitioners' telephones and this evidence was used as a basis for obtaining a search warrant in violation of Title 47, U.S. Code, Section 605, it also violated that provision of Article 35, Section 5, of the Annotated Code of Maryland when it states

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case;"

Petitioners are not unaware of this court's ruling in *Wolf* v. *California*, 338 U.S. 25, and are also aware that the Maryland courts have ruled that wire tapping per se does not constitute an illegal search and seizure. Indeed, when petitioners sought to enjoin the respondents from introducing evidence seized as a result of wire tapping, the relief was denied in an exhaustive opinion by Judge Chesnut in *Bradburd et al.* v. *Dawson et al.*, 101 Fed. Supp. 414.

We urge upon this court, however, that when police officers deliberately violate Title 47, Section 605, of the U.S. Code and violate the spirit of Article 35, Section 5, of the Annotated Code of Maryland, the combination overreaches the latest expression of this court in *On Lee* v. *United States, supra,* on what limits and to what extent prosecuting officers can use duplicitious tactics in obtaining a conviction. We feel that in the instant case, where petitioners' conviction rests solely upon the fruits of the search warrant which was obtained by the medium of wire tapping and where petitioners' conviction was obtained by the medium of wire tapping, in violation not only of the Federal statute, but of the spirit of the State statute, the prosecution has violated the rule announced by this court in *Berger* v. *United States,* 295 U.S. 78, and the conviction lacks fundamental fairness. For this reason, we feel this court should grant certiorari.

JAMES J. LAUGHLIN,
ALBERT J. AHERN, JR.,
Counsel for Petitioners.

I certify that I have this 21 day of January, 1953, served a copy of this Petition for Rehearing on Hall Hammond, Esq., Attorney General's Office, Room 1201, Mathieson Bldg., Baltimore 2, Maryland.

I certify that this Petition for Rehearing is filed in good faith and not for the purpose of delay.

JAMES J. LAUGHLIN.